

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

|                           |   |                        |
|---------------------------|---|------------------------|
| UNITED STATES OF AMERICA, | ) | No. 07-2155 SC         |
|                           | ) | CR-87-0359 SC          |
| Plaintiff,                | ) |                        |
|                           | ) | ORDER DENYING          |
| v.                        | ) | DEFENDANT DENNIS CHAN  |
|                           | ) | LAI'S MOTION TO        |
| DENNIS CHAN LAI,          | ) | <u>VACATE SENTENCE</u> |
|                           | ) |                        |
| Defendant.                | ) |                        |
|                           | ) |                        |
| _____                     | ) |                        |

**I. INTRODUCTION**

The present matter is before the Court on the Motion to Vacate Sentence under 28 U.S.C. § 2255 ("Motion") filed pro se by the defendant Dennis Chan Lai ("Defendant" or "Mr. Lai"). Docket No. 1 & Docket No. 717 in original criminal case, Case No. CR-87-359.<sup>1</sup> The Government filed an Opposition and Mr. Lai filed several Replies. Docket Nos. 730, 732, 735. For the reasons discussed below, Mr. Lai's Motion is DENIED.

**II. BACKGROUND**

In 1987, Mr. Lai was indicted by a federal grand jury in San Francisco in a 40-count indictment charging him with possession

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<sup>1</sup> For sake of clarity, the Court will hereinafter reference the docket in case number CR-87-359.

1 with intent to distribute a controlled substance in violation of  
2 21 U.S.C. § 841(a)(1), conspiracy in violation of 21 U.S.C. § 846,  
3 engaging in a continuing criminal enterprise in violation of 21  
4 U.S.C. § 848, interstate travel in aid of racketeering in  
5 violation of 18 U.S.C. § 1952(a)(3), and possession of illegal  
6 weapons in violation of 26 U.S.C. § 5861(d) and (i). Docket No.  
7 1. Mr. Lai was subsequently found guilty by a jury on 38 of the  
8 40 counts and sentenced by this Court to life imprisonment,  
9 followed consecutively by a 20-year sentence and a 10-year  
10 sentence, along with several sentences to be served concurrently.  
11 Docket No. 425.

12 On July 12, 1988, Mr. Lai timely appealed his conviction on  
13 several grounds and, on July 26, 1995, after a remand for an  
14 evidentiary hearing, Mr. Lai's conviction was ultimately affirmed  
15 in its entirety by the Ninth Circuit. Docket No. 429 (appeal);  
16 United States v. Lai, 944 F.2d 1434 (9th Cir. 1991) (affirming in  
17 part and remanding for evidentiary hearing); United States v. Mr.  
18 Lai, Nos. 92-10732, 92-10733, 1995 WL 444663, at \*1 (9th Cir.  
19 1995) (unpublished order finding that "the district court did not  
20 abuse its discretion either in its admission of the records or in  
21 the manner in which it held the evidentiary hearing").

22 On September 18, 1995, Mr. Lai filed a motion seeking to  
23 correct his sentence pursuant to Federal Rule of Criminal  
24 Procedure 35(a). Docket No. 619. In this motion, Mr. Lai raised  
25 numerous claims, including ineffective assistance of counsel,  
26 double jeopardy, Fourth Amendment violations, inadmissible  
27 hearsay, Brady violations, and prosecutorial misconduct. Id.

1 This Court denied the motion on October 10, 1995. Docket No. 621.  
2 Mr. Lai quickly appealed this denial and, on August 12, 1996, the  
3 Ninth Circuit, in an unpublished order, construed the motion as  
4 one under 28 U.S.C. § 2255 and denied it. Docket No. 623 (Mr.  
5 Lai's appeal); United States v. Mr. Lai, No. 95-10457, 1996 WL  
6 468598, at \*1 (9th Cir. 1996) (unpublished). While this appeal  
7 was still pending, Mr. Lai, on November 6, 1995, filed a motion to  
8 correct his sentence pursuant to 28 U.S.C. § 2255, asserting that  
9 he had been subjected to double jeopardy as a result of certain  
10 civil forfeitures. Docket No. 624. This Court denied the motion  
11 on September 9, 1996. Docket No. 650.

12 On April 28, 1997, Mr. Lai filed his third collateral attack  
13 on his sentence, styling the motion as one under 28 U.S.C. § 2255.  
14 Docket No. 668. This Court denied this motion on June 24, 1997,  
15 finding that Mr. Lai had failed to obtain an order from the Ninth  
16 Circuit permitting him to file a successive § 2255 motion and  
17 stating that the motion merely raised the same arguments as the  
18 previous § 2255 motion. Docket No. 677; see also Gov't Opp'n Ex.  
19 C at 2.

20 On November 25, 1997, Mr. Lai filed another motion to correct  
21 his sentence under Rule 35, arguing that his sentence was  
22 ambiguous in that it should have included an eventual possibility  
23 of parole. Docket No. 680. This Court, on March 12, 1998, denied  
24 the motion, stating "Lai's sentence is unambiguous. He is not  
25 eligible for parole for the life term imposed on him for violation  
26 of [21 U.S.C.] Section 848." Gov't Opp'n Ex. D at 5; Docket No.  
27 694.

1 In the intervening time, Mr. Lai has, on four separate  
2 occasions, sought authorization from Ninth Circuit to file  
3 successive § 2255 motions. The Ninth Circuit denied all four  
4 requests. See Gov't Opp'n Exs. E, F, G, H (Order denying  
5 application to file successive petition in case 00-70993, dated  
6 January 11, 2001; Order denying application to file successive  
7 petition in case 01-70316, dated April 16, 2001; Order denying  
8 application to file successive petition in case 04-72411, dated  
9 July 15, 2004; Order denying application to file successive  
10 petition in case 05-70046, dated February 15, 2005).

11 On April 13, 2007, Mr. Lai filed the present Motion asserting  
12 various claims, including the following: he was prejudiced by the  
13 fact that his original Rule 35 motion was characterized as a §  
14 2255 claim; his sentence is illegal under Fiore v. White, 531 U.S.  
15 225 (2001); prosecutorial misconduct; impermissible use of race as  
16 a criteria in jury selection; Fourth amendment search and seizure  
17 violations; and ineffective assistance of counsel.

18  
19 **III. DISCUSSION**

20 "Pro se complaints and motions from prisoners are to be  
21 liberally construed." United States v. Seesing, 234 F.3d 456, 462  
22 (9th Cir. 2000). Nonetheless, "[u]nder the Antiterrorism and  
23 Effective Death Penalty Act ('AEDPA'), the opportunity to file  
24 successive motions under 28 U.S.C. § 2255 is strictly limited."  
25 Id. at 463. "Before filing a successive petition in the district  
26 court, 28 U.S.C. § 2244(b)(3) requires [a petitioner] to make a  
27 'prima facie showing' to [the Ninth Circuit] that his petition  
28

1 would satisfy section 2244(b)(2)." Woratzeck v. Stewart, 118 F.3d  
2 648, 650 (9th Cir. 1997). Section 2244 states, in part:

3 Before a second or successive application  
4 permitted by this section is filed in the  
5 district court, the applicant shall move  
6 in the appropriate court of appeals for  
7 an order authorizing the district court  
8 to consider the application.

7 28 U.S.C. § 2244(b)(3)(A).

8 Section 2255 states, in part:

9 A second or successive motion must be  
10 certified as provided in section 2244 by  
11 a panel of the appropriate court of  
12 appeals to contain--(1) newly discovered  
13 evidence that, if proven and viewed in  
14 light of the evidence as a whole, would  
15 be sufficient to establish by clear and  
16 convincing evidence that no reasonable  
17 factfinder would have found the movant  
18 guilty of the offense; or (2) a new rule  
19 of constitutional law, made retroactive  
20 to cases on collateral review by the  
21 Supreme Court, that was previously  
22 unavailable.

17 28 U.S.C. § 2255.

18 Mr. Lai has not sought authorization from the Ninth Circuit  
19 to file the instant Motion. Without this authorization, this  
20 Court is statutorily precluded from entertaining the Motion.

21 Mr. Lai, in an effort to circumvent the need for this  
22 authorization, invokes Castro v. United States, 540 U.S. 375  
23 (2003). This reliance, however, is unavailing. In Castro, the  
24 Court held that if a court construes a motion to be a § 2255  
25 motion, it must first provide the defendant with various warnings  
26 regarding the consequences of such a characterization. Id. at  
27 383-84. In particular, the Court was concerned with situations

1 where a defendant initially files a motion that is either  
2 ambiguously titled or one that is styled as a Rule 35 or Rule 33  
3 motion and that motion is subsequently construed by a court to be  
4 a § 2255 motion. The Court explained that "[s]uch  
5 recharacterization can have serious consequences for the prisoner,  
6 for it subjects any subsequent motion under § 2255 to the  
7 restrictive conditions that federal law imposes upon a 'second or  
8 successive' (but not upon a first) federal habeas motion." Id. at  
9 377 (citing 28 U.S.C. § 2255). In light of these consequences,  
10 the Court held that a court

11 cannot so recharacterize a pro se  
12 litigant's motion as the litigant's first  
13 § 2255 motion unless the court informs  
14 the litigant of its intent to  
15 recharacterize, warns the litigant that  
16 the recharacterization will subject  
17 subsequent § 2255 motions to the law's  
18 'second or successive' restrictions, and  
19 provides the litigant with an opportunity  
20 to withdraw, or to amend, the filing.

21 Id. (emphasis in original).

22 It is undisputed that the Ninth Circuit construed Mr. Lai's  
23 appeal of this Court's denial of his Rule 35 motion as a § 2255  
24 motion. See United States v. Mr. Lai, 1996 WL 468598, at \*1  
25 (unpublished decision) (stating "Dennis Chan Lai appeals pro se  
26 the district court's denial of his Fed. R. Crim. P. 35(a) motion  
27 to correct the life sentence that was imposed after a jury  
28 convicted him in 1988 of racketeering and conspiracy to distribute  
cocaine. We treat this appeal as from the denial of a 28 U.S.C. §  
2255 motion.") Mr. Lai argues that because he did not receive the  
warnings in 1996 that Castro now mandates, his present motion

1 cannot be considered a second or successive motion.

2 The issue of whether Castro applies retroactively remains  
3 undecided. See, e.g., Castro, 540 U.S. at 383 (stating that the  
4 Supreme Court's "'supervisory power' determinations normally  
5 apply, like other judicial decisions, retroactively, at least to  
6 the case in which the determination was made"); United States v.  
7 Blackstock, 513 F.3d 128, 134 n.2 (4th Cir. 2008) (recognizing  
8 Fourth Circuit precedent that "[n]ew rules of constitutional  
9 criminal procedure are generally not applied retroactively on  
10 collateral review," determining that granting relief in that case  
11 does not "amount[] to retroactive application of Castro," and  
12 holding that "Castro does not invalidate prior unwarned  
13 recharacterizations of pro se filings, but instead establishes a  
14 rule governing the effect that will be given to those unwarned  
15 recharacterizations in the future, when a subsequent § 2255  
16 petition is filed") (internal quotation marks omitted).

17 Even assuming, arguendo, however, that Castro were  
18 retroactive, Mr. Lai's Motion would nonetheless be barred. Castro  
19 was decided in 2003, but Mr. Lai did not file his Motion until  
20 2007. Section 2255 states:

21 A 1-year period of limitation shall apply  
22 to a motion under this section. The  
23 limitation period shall run from the  
24 latest of--

- 25 (1) the date on which the judgment  
26 of conviction becomes final;  
27 (2) the date on which the impediment  
28 to making a motion created by  
governmental action in violation of  
the Constitution or laws of the  
United States is removed, if the  
movant was prevented from making a  
motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or  
(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2255(f). Thus, under § 2255(f)(3), Mr. Lai had one year after the Supreme Court announced the new rule in Castro to file this Motion. And, even if Castro were to be made retroactive by the Supreme Court at a later date, the Supreme Court has already held that the one-year limitation period of § 2255(f) runs "from the date on which the right [asserted] was initially recognized by this Court," not the date on which the right asserted was made retroactively applicable. Dodd v. United States, 545 U.S. 353, 357 (2005). Thus, assuming for argument retroactive application of Castro, Mr. Lai's Motion was filed outside of the one-year limitations period contained in § 2255.

Finally, on November 6, 1995, at the time Mr. Lai's Rule 35 motion was pending before the Ninth Circuit, he filed what he titled a § 2255 motion with this Court. Docket No. 624. That motion was denied on the merits. Docket No. 650; Gov't Opp'n Ex. B. In 1997, Mr. Lai filed another § 2255 motion, which this Court also denied, finding that it was both a successive petition filed without the appropriate authorization from the Ninth Circuit and that the motion was largely duplicative of the Rule 35 motion already denied on the merits by both this Court and the Ninth



1 Circuit.<sup>2</sup> Thus, even if Castro did provide an avenue through  
2 which Mr. Lai could argue that he was entitled to file a § 2255  
3 motion after his Rule 35 motion, that § 2255 motion was already  
4 filed on November 6, 1995.

5  
6 **IV. CONCLUSION**

7 For the reasons discussed herein, Mr. Lai's Motion is DENIED.

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9 IT IS SO ORDERED.

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11 Dated: January 5, 2009



12 UNITED STATES DISTRICT JUDGE  
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27 <sup>2</sup> It was this motion that was construed by the Ninth Circuit  
28 to be a § 2255 motion.